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In the Supreme Court of the United States

OCTOBER TERM, 1978

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

WASHINGTON STATE COMMERCIAL PASSENGER FISHING VESSEL ASSOCIATION, ET AL.

STATE OF WASHINGTON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

PUGET SOUND GILLNETTERS ASSOCIATION, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

ON WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

By order dated November 13, 1978, the Court consolidated three cases involving related decisions of the Supreme Court of the State of Washington, the United States Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington.

In No. 77-983, the State of Washington challenges the decisions of the Washington Supreme Court in *Washington* v. *Washington State Commercial Passenger Fishing Vessel Association* and *Washington* v. *Puget Sound Gillnetters Association* (hereafter "*Fishing Vessel II*" and "*Gillnetters*," or "the state cases").

In No. 78-119, the State of Washington challenges the decision of the Ninth Circuit in the consolidated cases of *Puget Sound Gillnetters Association* v. *United States District Court for the Western District of Washington* and *United States* v. *Washington* (hereafter the "Washington Fishery case" or "*PSGA* v. *District Court*"), and also challenges the separate decision of the court of appeals in *United States* v. *Washington* (hereafter the "International Fishery case").

In No. 78-139, the Puget Sound Gillnetters Association and the Purse Seine Vessel Owners Association challenge the decision of the Ninth Circuit in the Washington Fishery case, *supra*, and also challenge, before judgment in the court of appeals, the decision entered by the district court on June 6, 1978, in *United States* v. *Washington*, Civ. No. 9213 (W.D. Wash.) (hereafter the "1978 Enforcement Order").

The United States submits this single brief in all three cases.

OPINIONS BELOW

The opinion of the Washington Supreme Court in *Fishing Vessel II* (77-983 Pet. App. B-1 to B-20) is reported at 89 Wash.2d 276, 571 P.2d 1373. The opinion of the Washington Supreme Court in *Gillnetters* (77-983 Pet. App. D-1 to D-22) is reported at 88 Wash.2d 677, 565 P.2d 1151. The opinion of the court of appeals in the Washington Fishery case (78-119 Pet. App. A-1 to A-28) is reported at 573 F.2d 1123. The opinion of the court of appeals in the International Fishery case (78-119 Pet. App. A-29 to A-33) is reported at 573 F.2d 1118. The findings of fact, conclusions of law, and preliminary injunction of the district court issued upon entry of the 1978 Enforcement Order (78-139 Pet. App. C-1 to C-13) are reported at 459 F. Supp. 1020, 1125-1130.

The initial opinion of the district court, together with its findings of fact, conclusions of law, and declaratory judgment and decree (A. 63-208), is reported at 384 F. Supp. 312. The first opinion of the court of appeals (A. 39-60) is reported at 520 F.2d 676.

JURISDICTION

The judgment of the Washington Supreme Court in *Gillnetters* was entered on October 10, 1977, and that court's judgment in *Fishing Vessel II* was entered on November 23, 1977. The petition for a writ of certiorari in No. 77-983 was filed on January 9,

1978, and was granted on October 16, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1257(3).

The judgments of the court of appeals in the Washington Fishery case and the International Fishery case were entered on April 24, 1978. The 1978 Enforcement Order was entered by the district court on June 6, 1978, and a notice of appeal to the court of appeals was filed on July 19, 1978. The petition for a writ of certiorari in No. 78-119 was filed on July 21, 1978, and the petition in No. 78-139 was filed on July 24, 1978. Both petitions were granted on October 16, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether principles of finality, judicial comity and jurisdiction prevent relitigation in this Court of issues previously determined in the district court's Final Decision No. 1 and in the affirmance of that decision by the court of appeals, which became final when this Court denied review.

2. Whether treaties concluded in 1854 and 1855 reserved to Indian tribes in the State of Washington an opportunity to harvest up to one-half of any run of fish that normally would pass through the tribes' usual and accustomed off-reservation fishing grounds and stations.

3. Whether the State of Washington must manage and regulate its fisheries in such a manner as to ensure that federally guaranteed treaty fishing rights are protected, notwithstanding the absence of any

state statute specifically authorizing implementation of Indian fishing rights.

4. Whether, in light of the State of Washington's failure to adopt regulations permitting Indian fishermen to harvest their treaty share of fish, the district court properly exercised its discretion by allocating the salmon harvesting opportunity for the 1977-1978 fishing season in accordance with the court's prior decisions.

5. Whether, in light of the State of Washington's unwillingness or inability to prevent its non-treaty fishermen from encroaching on the fishing rights of treaty Indians, the district court properly enjoined state-licensed non-treaty fishermen from harvesting salmon in excess of their allocated share.

6. Whether the matters at issue in the International Fishery case are now moot.

TREATIES INVOLVED

The treaties involved in this case are the Treaty of Medicine Creek (10 Stat. 1132), the Treaty of Point Elliott (12 Stat. 927), the Treaty of Point No Point (12 Stat. 933), the Treaty with the Makahs (12 Stat. 939), the Treaty with the Yakimas (12 Stat. 951), and the Treaty of Olympia (12 Stat. 971). With immaterial variations, these treaties each provide (10 Stat. 1132-1133):

> ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States, all their right, title, and

interest in and to the lands and country occupied by them, bounded and described as follows * * *.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands, the following tracts of lands, * * * all which tracts shall be set apart, and, so far as necessary, surveyed and marked out for their exclusive use; * * *.

ARTICLE III. The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, * * *.

STATEMENT

A. The Initial Federal Court Litigation

1. *The parties and their positions*

In September 1970, the United States, on its own behalf and as trustee for several Indian tribes of the State of Washington, brought this suit against the State to require it to comply with treaties guaranteeing off-reservation fishing rights to the Indian tribes. The essential questions to be decided were the measure of the fishing rights provided the tribes by treaty, whether the then-existing state regulatory scheme infringed those rights, and, if so, what relief should be granted.

a. At the outset, the district court suggested that "so far as possible all tribes, agencies or organizations having or claiming direct or indirect justiciable interest [should] be brought into the case either as

parties or as amicus curiae * * *" (A. 64).[1] Non-Indian commercial fishermen exhibited little interest in participating. Two loosely organized associations of sportsmen [2] moved to intervene, as did the Washington Reef Net Owners Association.[3] The court denied intervention to the sportsmen, holding that they were adequately represented by the State. The unique position of the Reef Net Owners, whose acquisition and transfer of reefnet locations is not regulated by the State, was held to warrant limited intervention.[4] Many other organizations participated as amicus curiae (see A. 65).

As for petitioners in No. 78-139, neither association moved to intervene before trial, although the Purse Seine Vessel Owners Association did participate as amici curiae (A. 65). The Puget Sound Gillnetters Association never sought to participate in any capacity. On March 15, 1974, after the entry of Final Decision No. 1, the Purse Seine Vessel Owners Association moved to intervene (*id.* at 421-422). This motion was denied, on the court's finding that the motion was untimely and that the Association was in any

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[1] Meanwhile, pursuant to stipulations, additional tribes originally represented by the United States intervened on their own behalf or obtained private counsel. Also by stipulation, the Washington State Department of Fisheries and Washington State Game Commission, and their respective Directors, intervened as additional defendants.

[2] Washington State Sportsmen's Council (Docket No. 25), and Committee to Save Our Fish (Docket No. 34).

[3] Docket No. 39.

[4] Transcript of May 25, 1972.

event adequately represented by the State (A. 423). The Washington State Commercial Passenger Fishing Vessel Association (respondent in No. 77-983) also sought intervention after judgment. Its motion was denied on July 18, 1974, without prejudice to a renewed motion if relief could not be obtained in state court (*id.* at 426-427). Neither association appealed the denial of intervention.

b. The Washington State Game Commission argued that, except for a right of access over private lands and an exemption from the payment of license fees, the treaties afforded the Indians no rights not enjoyed by other citizens, and thus any regulation treating Indians and others equally (such as a prohibition of net-fishing at a usual Indian fishing ground) was valid.[5] The Washington State Department of Fisheries, contrary to the Game Commission, acknowledged that the treaties in question provided the tribes with special fishing rights at their usual and accustomed places and obliged it to afford the tribes a "fair and equitable share" of the harvestable salmon returning to those waters (Fisheries, Pretrial Br. at 2; Final Pretrial Order at 83, 87, 137-138). It contended that its regulations were a lawful exercise of state police power, but it requested the court "to quantify the treaty right by reference to an objective, definite standard" which should be stated in terms of a "percentage, set by the court, of the harvestable salmon which originate in and return to waters of

[5] Game, Pretrial Br. at 3; Final Pretrial Order at 79.

the State of Washington in the case area" (Fisheries, Pretrial Br. at 8, 22; see also page 2). In its post-trial brief, at page 36, and in argument in the district court (Tr. 4384), the Department of Fisheries proposed "one-third" of the runs originating in the rivers where Indians fish as a fair share for the tribes.

The tribes argued that the State was without authority to regulate their fishing, that the State had no right to permit such heavy fishing by non-Indians before the fish reach the Indians, and that the State, contrary to the treaties, was preventing the Indians from taking fish necessary to satisfy their needs. They argued that the test under the treaties should be their needs, not a percentage of the harvest, drawing an analogy to Indian water rights as defined in *Winters* v. *United States*, 207 U.S. 564 (1908) (see *e.g.*, Muckleshoot, Pretrial Br. at 8-11).

The United States conceded that the State had the power to regulate off-reservation Indian fishing, but only if it was shown that the regulation was reasonable and necessary for conservation, met appropriate standards, and did not discriminate against the Indians by making them suffer the brunt of the conservation measures. The United States argued that non-Indian fishing should be regulated in such a manner as to permit the tribes at their off-reservation fisheries the opportunity to catch as many fish as required to fill their needs, but subject to a ceiling of 50% of the harvestable portion of the runs involved (Plaintiffs' Post-trial Br. at 81-84).

2. *The district court decision*

a. After extensive pretrial development of the evidence and an 18-day trial, the court entered detailed findings of fact (Findings 1-253, A. 96-191). Essentially, the court found that at the time the treaties were made the treaty tribes fished for trade as well as subsistence and ceremonial purposes (Findings 2-14, A. 99-105). In negotiating the treaties the tribes were willing to give up large areas of land, but they insisted, and the United States agreed, that they could continue to fish at their usual and accustomed places off the reservations, although they would share those fisheries with the citizens of the territory (Findings 19-28, A. 108-113). At the time of the treaties, neither party intended to restrict the other's fishing because they did not contemplate that they would interfere with each other (Finding 28, A. 113).

Subsequent to the treaties, the Indians continued fishing on their reservations and at their usual and accustomed places off the reservations, and such fishing "still provides an important part of their livelihood, subsistence and cultural identity" (Finding 31, A. 114; Findings 29-34, A. 113-115). Many of the tribes have adopted written fishing regulations for on and off-reservation fishing designed to assure proper escapement (Findings 34, 42, 59, 69, 79, 90, 99, 116, 124, 159, 160, 190, A. 115-169).

The court found that as the number of non-Indian fishermen grew and the State adopted conservation measures, those regulations favored non-Indian fishermen to the detriment of the treaty fishermen. More

specifically, the court found that "[e]nforcement of state fishing laws and regulations against treaty Indians fishing at their usual and accustomed fishing places has been in part responsible for prevention of the full exercise of Indian treaty fishing rights, loss of income to the Indians, inhibition of cultural practices, confiscation and damage to fishing equipment, and arrest and criminal prosecution of Indians" (Finding 193, A. 170); that tribal fishermen have avoided using some usual and accustomed fishing places because of State enforcement actions (Finding 33, A. 115); and that the Departments of Fisheries and Game have seized and detained Indian boats, nets, and fish caught by Indians without notice to their owners and without judicial proceedings (Findings 194-195, A. 170-171).

The court also found that "[t]he regulations of the Department of Fisheries, as presently framed and enforced, in many instances allow all or a large portion of the harvestable numbers of fish from given runs to be taken by persons with no treaty rights before such runs reach many of the Plaintiff tribes' usual and accustomed fishing places to which the treaties apply" (Finding 217, A. 179-180).

There was no showing that tribal fishing on reservations, which had been free of state control, had been detrimental to conservation, although many of the reservations straddle the mouths of major river systems, making the essential spawning escapement for any run dependent on passage through them. With respect to off-reservation fishing, the court noted (A. 81):

With a single possible exception testified to by a highly interested witness (FF #102) and not otherwise substantiated, notwithstanding three years of exhaustive trial preparation, neither Game nor Fisheries has discovered and produced any credible evidence showing any instance, remote or recent, when a definitely identified member of any plaintiff tribe exercised his off-reservation treaty rights by any conduct or means detrimental to the perpetuation of any species of anadromous fish.

Unfortunately, insinuations, hearsay and rumors to the contrary, usually but not always instigated anonymously, have been and still are rampant in Western Washington. Indeed, the near total absence of substantial evidence to support these apparent falsehoods was a considerable surprise to this court.

b. The district court held that each of the plaintiff tribes had reserved for itself and its members an exclusive right of fishing within its reservation boundaries, and a right to fish at all usual and accustomed grounds and stations outside those boundaries but "in common with citizens of the Territory." Concerning the scope of the latter right, the Court ruled (Conclusion 20, A. 195):

> The right secured by the treaties to the Plaintiff tribes is a reserved right, which is linked to the marine and freshwater areas where the Indians fished during treaty times, and which exist in part to provide a volume of fish which is sufficient to the fair needs of the tribes. The right is to be exercised in common with non-Indians, who may take a share which is fair by comparison with the share taken by the tribes. Neither the Indians nor the non-Indians may fish in a manner so as to destroy the resource or to preempt it totally.[6]

Thus, the court concluded that "[t]he phrase 'in common with' operates only to limit the exercise of the tribes' right to a share of the resource which will be consistent with preservation and maintenance of the resource and with the reasonable harvest by others of such fish as are not reasonably needed by the tribe * * *" (Conclusion 28, A. 197).

The court also held that the 1937 convention between Canada and the United States did not modify the treaties with the Indians but that "treaty right tribes fishing in waters under the jurisdiction of the International Pacific Salmon Fisheries Commission [established by the convention] must comply with regulations of the Commission" (A. 214).

The court reserved for a subsequent trial the question of the effect of fish hatcheries (whether Indian, federal, or state) and environmental changes (such as dams) on the fishing rights (see A. 214). The hatchery aspect is set for trial on June 4, 1979, and motions for partial summary judgment have been filed on the environmental issues.

c. The court issued an injunction which recognized the overriding authority of the State in pre-

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[6] See also Conclusions 21-29, A. 195-197.

serving the fishery (Injunction, para. 8, A. 222), and provided for state emergency regulation over all tribal off-reservation fishing without prior court approval (Injunction, para. 19, A. 225). The court's order also provided that tribes meeting certain standards (A. 84-85) would be permitted to regulate their own off-reservation fishing, subject to monitoring by the State, state emergency regulation, and return to state regulation in case of abuse by the tribe (Injunction, para. 2, A. 219-220). In other cases, off-reservation fishing would be regulated by the State, if the need for such regulation was established in advance (Injunction, para. 3, A. 220).

The court also directed the State to reduce non-Indian fishing on runs that would normally pass through the usual and accustomed off-reservation fishing places of the treaty tribes to the extent necessary to permit treaty Indians to exercise their fishing rights. In response to requests by both the United States and the State (see pages 8-9, *supra*), the court established a formula for determining the maximum extent of the tribes' entitlement (A. 88-89). The formula provides basically that the tribes are entitled to have the opportunity to fish for up to one-half of any run of fish that normally would pass through their off-reservation sites, with various adjustments for fish caught beyond state jurisdiction and for subsistence and ceremonial fishing. On-reservation catches are not to be included in computing the tribal share (*ibid.*).

The court directed the state defendants, prior to each fishing season, to obtain data from the tribes

concerning the types of gear they expect to use and the quantity of fish they expect to be able to catch, and to take account of such information and the limits of the tribes' entitlement in making their predictions and regulations for the coming season (Injunction, para. 17, A. 224-255). The court also entered an interim plan and stay order for the gradual and orderly implementation of its judgment (A. 229-231).

3. *Appellate proceedings*

a. All parties, except the United States, appealed. In a full opinion (A. 39-60), the court of appeals affirmed in all respects, although clarifying one point. This was that foreign fishing beyond the State's jurisdiction does not justify a compensatory adjustment in determining the run on the basis of which the treaty share is calculated (A. 53, 59).

The court expressly rejected the State's contention that the treaties merely protected the Indians against discrimination, concluding that such a rule would "render[] the treaty guarantees nugatory" (A. 46). In the court's view, the tribes were entitled to an equitable apportionment of the fishery in order to remedy the State's "exploitation of [the] common property" in a manner that "effectively allots [the Indians] a decreasing share of the resource" (A. 50). Express approval was given to the district court's decision that treaty fishermen "are entitled to an opportunity to catch one-half of all the fish which, absent the fishing activities of other citizens, would pass their traditional fishing grounds" (A.

50). The details of implementation, it was held, were largely within the trial court's broad equitable discretion (*ibid.*). The appellate court found no abuse and accordingly affirmed.

b. Three petitions for certiorari were filed in this Court by the State and the non-Indian groups. All were denied. 423 U.S. 1086 (1976).

B. Implementation Of The Federal Court Decision: 1974-1976

Implementation of the district court's decree has proved difficult. The State of Washington has not discharged its responsibilities under the decision, and non-treaty fishermen have continued to fish throughout the area in disregard of state regulations and the orders of the district court.[7] In each fishing season since the decision, the United States and the tribes have been forced to return to the district court seeking further orders to secure compliance with the decision. At the same time, non-Indian fishermen have instituted numerous suits against the State of Washington in the state courts, seeking declaratory and injunctive relief against implementation of state regulations that limit non-treaty fishing to protect treaty rights in compliance with the federal court's mandate. The state courts have consistently granted such relief, holding not only that the regulations are in violation of state law, but that the federal district

[7] The Joint Appendix contains a summary of the record evidence relating to illegal non-treaty fishing and the inability of the State to combat it (A. 601-609).

court's interpretation of the Indians' treaty rights was erroneous and unconstitutional.

1. The 1974 fishery is illustrative. In its Memorandum Decision on Plaintiffs' Request for Determination and Injunction (A. 427-437), the district court found that the State of Washington had been unable to reduce the non-treaty fishery because of orders issued by the Thurston County Superior Court in *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*, No. 50370; *Washington Kelpers Association* v. *Tollefson*, No. 50552; and *Puget Sound Gillnetters Association* v. *Tollefson*, No. 50757.[8] The court further found that the treaty tribes had taken fewer fish, both in terms of numbers and as a percentage of the total harvest, up to that point in the 1974 season than they had during the years preceding the judicial apportionment in Final Decision No. 1 (A. 430). Presented with no alternative by the State, the district court enjoined the state court from enforcing its decision in *Puget Sound Gillnetters, supra.*[9]

2. The problems of the 1974 season were an accurate portent of the difficulties to follow. During

[8] The district court noted that none of the state suits involved a full-scale evidentiary hearing. Affidavits of the litigants provided the only evidence, and these were not subjected to cross-examination (A. 431).

[9] A. 433-434. The district court did not interfere with the state court action in the other two cases in light of its finding (A. 432-433) that the proposed state regulations would not have made significant numbers of additional fish available for harvest by treaty tribes in any event.

the 1975 season, the Department of Fisheries was again unable to make sufficient reductions in the non-treaty fishery to ensure the treaty tribes a fair harvesting opportunity. The 1975 Joint Salmon Catch Report shows that the treaty tribes caught 32% of Puget Sound origin runs (333,900 fish), while the non-treaty fishermen caught 64% (722,200 fish).[10] During the season a series of injunctive orders were issued to remedy the State of Washington's refusal to manage the steelhead, chinook, pink, sockeye, coho and chum salmon runs in accordance with Final Decision No. 1.[11]

Stymied in their legal attempts to frustrate the federal decision, the non-treaty fishermen chose to engage "in a substantial fishery on the 1975 coho salmon run in direct violation of regulations issued by the State of Washington and orders of [the] court" (A. 450). The State of Washington did little to prevent these recurring violations. Citations were routinely dismissed by county prosecutors and judges (A. 521, 524-525). The situation became so aggra-

[10] Ninth Circuit Record in No. 77-3654, at R. 1042. This excludes the much larger Canadian-origin runs, which also pass through the usual and accustomed places of some treaty tribes. On these runs, the tribes took only 1.7% (62,300 fish), while non-treaty fishermen harvested 98.3% (3,537,200 fish). However, the tribes did not then, nor do they now, assert that they have sufficient fishing "power" (boats, gear, experience) to harvest 50% of the Canadian-origin runs.

[11] See Transcripts of January 9 and 14, 1975; and Ninth Circuit Record in No. 77-3654, at R. 745, 752, 756, 770, 775, 782, 790, 797, 799 and 806.

vated that Judge Boldt was led to observe (A. 499-500):

> A factor that has been mentioned but not sufficiently emphasized in my opinion has been disturbing me deeply, not merely for the purposes of this case but for the dignity and honor of the people of this great, wonderful area where I have lived for 50 years. Mr. Moos told us that there have been 300 citations of non-treaty fishermen over a relatively short period, and that out of all of the 300 only one individual has been penalized by the civil and criminal processes of the state. We have indisputable evidence that substantial numbers of non-treaty fishermen willfully and deliberately have obstructed treaty fishermen to a very substantial extent, even in the period where they were entitled to exclusive fishery. This is outlaw fishing, and the Court can do nothing but condemn it as an arrogant and flagrant, as well as unlawful, effort to defeat the basic purposes and intent of *United States* v. *Washington*. * * * I am completely satisfied that the treaty take of chum, as well as other runs, has been substantially diminished from what it would have been had there not occurred this willful violation of the law and the failure to enforce the law.

3. During the 1976 season, the State again failed to restrict its non-treaty fishermen as required by Final Decision No. 1, resulting in additional injunctive orders by the district court (*e.g.*, A. 466-470). The court also attempted to deter the widespread illegal non-treaty fishing by including a penalty pro-

vision (A. 470). Nevertheless, the illegal fishing continued, and the State of Washington publicly announced its inability to control it and requested the assistance of the United States Coast Guard (A. 603).[12]

Throughout the 1974, 1975 and 1976 seasons, the district court relied on the State of Washington to adopt and enforce regulations enabling the treaty tribes to take their share of the harvest. By the beginning of the 1977 season, however, it became clear that the court could no longer expect even minimal compliance from the State, in large measure because of the state supreme court's decision in *Puget Sound Gillnetters Association* v. *Moos*, now before this Court. We accordingly turn to the proceedings in the Supreme Court of Washington.

C. The State Court Cases

We have already noted that injunctions were repeatedly sought and obtained from the state county court. Many such orders were stayed by the federal district court (*e.g.*, A. 434), and the Department of Fisheries, however haltingly, continued to obey the

[12] Although non-treaty fishermen took more than 135,000 fish in violation of state regulations during the 1976 season (78-139, Pet. App. C-9), the district court's efforts to attain a fair division of fishing opportunity moved a step forward. The treaty tribes were enabled to harvest approximately 37% of the Puget Sound origin runs (423,600 fish). Again, this excludes the larger Canadian origin runs, as to which the tribes do not have the ability to take 50% of the harvest. Even on these runs, however, the treaty share increased in 1976 to 7.3% of the American share.

latest court directive. A far more difficult situation resulted, however, after the state supreme court intervened in mid-1977.

1. The first case to reach that court was *Washington State Commercial Passenger Fishing Vessel Association* v. *Tollefson*. The suit had been filed in the Thurston County Superior Court to challenge certain regulations issued by the Washington Department of Fisheries in response to the federal district court's initial decision. Temporary injunctions against the Fisheries Director were issued in the Summer of 1974, but the federal court took no action, concluding (as already noted, *supra*, note 9) that the particular regulations restrained were of only marginal importance (A. 432-433). In January 1975, the superior court invalidated those regulations and permanently enjoined the Fisheries Director from enforcing them (77-983 Pet. App. G-1 to G-7). At no stage did the United States or the tribes participate in the proceedings.

Long before the case was first heard by the state supreme court in 1976, the regulations had been superseded. But, far from interposing that or any other objection to the court's consideration of the case, the Fisheries Director urged a decision on the merits (see 77-983 Pet. App. F-2). The court itself expressly noted the conflict between the order under review and the decision of the federal district court, questioned whether the state courts were free to disregard "with impunity" the inconsistent federal ruling, and concluded that it would be inadvisable to reach issues which had "not been raised, and much less argued,"

and were "ignored in the briefs" of the parties (77-983 Pet. App. F-3, F-5 to F-6). Accordingly, that court initially dismissed the appeal as moot (77-983 Pet. App. F-1 to F-6). In November of that year, however, rehearing was granted and the case was set for re-argument (77-983 Pet. App. E).

2. Before any decision on rehearing was handed down in *Fishing Vessel*, another case had overtaken it. *Puget Sound Gillnetters Association* v. *Moos*, also before this Court. This was an application for mandamus against the Fisheries Director, filed directly in the state supreme court. Neither the United States nor the treaty tribes were parties to the action, although they participated as amici curiae. The application primarily sought an order directing the State Fisheries Department to issue regulations which gave no special recognition to treaty fishermen. Once again, that Department suggested no obstacle to the court's entertaining the action, but, on the contrary, urged a decision on the merits.

On June 9, 1977, the state supreme court issued an opinion accepting the non-Indians' arguments, though declining to issue the requested writ of mandamus [13] (77-983 Pet. App. D-1 to D-17). The court

[13] The court stated that it had "full confidence that the director will abide by our decision" (77-983 Pet. App. D-4). Subsequently, the non-Indian fishing associations filed another motion for mandamus, contending that the Director of Fisheries apparently was still following the orders of the federal district court and that the writ of mandamus was thus necessary to enforce the judgment of the state court. The court heard argument on the motion on October 31, 1977, and the matter is still under submission.

held that, under state law, the Director of Fisheries lacked statutory authority to restrict fishing for any purpose other than conservation. Since, in the court's view, the state agency could not be compelled to act beyond its statutory authority, the court concluded that the Director had no power to enforce the Indian treaty rights by restricting non-treaty fishing. Declining to follow the federal courts' decision in *United States* v. *Washington*, *supra*, the state court held that the treaties guaranteed to the Indians only the same opportunities to fish as are enjoyed by non-treaty fishermen. The court accordingly concluded that state regulations are valid only so long as they treat all fishermen alike. Three Justices dissented, believing the court was bound by the ruling of the federal district court (77-983 Pet. App. D-17 to D-22).

3. On November 23, 1977, the State Supreme Court rendered its decision on rehearing in the *Fishing Vessel* case (77-983 Pet. App. B-1 to B-12). After re-affirming its holding in *Gillnetters*, *supra*, the court added a new rationale: that recognizing special treaty fishing rights for Indian fishermen would violate the constitutional rule of equal protection. The trial court's judgment was affirmed, two Justices voting to dismiss the appeal as moot, two others dissenting on the merits.[14]

[14] In addition to the state decisions before this Court, see also *Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash. 2d 799, 567 P.2d 205 (1977); *Grays Harbor Gillnetters Association* v. *Sandison*, Wash. Sup. Ct., No. 45144 (argued Oct. 31, 1977); *Puget Sound Gillnetters Association* v. *Sandi-*

D. Implementation Of The Federal Court Decision: 1977-1978

1. *The 1977 allocation order*

As already noted, the state supreme court's rulings brought to an effective halt the cooperation of the Department of Fisheries in enforcing the federal district court's decree. In July 1977, the State adopted regulations that "[made] no allowance [and] no exceptions for the Indian opportunity to harvest" (A. 507; see also A. 500-513, 603-604). Moreover, the State began enforcing general state fishing laws against treaty Indians in circumstances admittedly not related to conservation (*ibid.*). Under these circumstances, the district court concluded that it could no longer rely on the Department of Fisheries to achieve compliance with its prior rulings. Instead, at the request of the United States and the tribes, the court itself decreed the allocation of the fishing opportunity for the 1977 season. The court then enjoined the State from authorizing or permitting harvest of the treaty fishermen's share, and directed the State to manage only the remaining portion for non-treaty fishermen. Preliminary Injunctions of August 10 and 31, 1977, 459 F. Supp. at 1097-1104.

This action of the federal court was undertaken "reluctantly, but necessarily" (78-119 Pet. App. A-55). Under the federal court order, the Department's only obligation was to ensure that non-treaty

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son, Thurston County Super. Ct., No. 58107 (decided Aug. 24, 1977); and *Columbia River Fishermen's Protective Union, Inc.* v. *Dixie Lee Ray*, Thurston County Super. Ct., No. 55339 (decided Aug. 25, 1977).

fishermen did not harvest in excess of the numbers authorized by the federal court. The State Director of Fisheries then promulgated regulations consistent with this order. Immediately, non-Indian fishermen, as is their annual custom, brought suit against the Director in the Superior Court for Thurston County, Washington. *Puget Sound Gillnetters Association* v. *Sandison*, No. 58107 (see A. 31-32). That court enjoined the Director from adopting and enforcing the regulations ordered by the federal district court. Further, the state court ordered the Director to adopt regulations which would eliminate the opportunity for treaty fishermen to harvest their treaty share, in defiance of the federal district court's prior orders including Final Decision No. 1 (see A. 32).

In order to protect and effectuate its prior orders, and to preserve its jurisdiction over the subject matter, the federal district court stayed the state court injunction and enjoined the state court from proceeding further in contravention of the federal court's orders (Order of August 31, 1977, 459 F. Supp. at 1104-1107; see A. 32-33). In light of the stay of state court proceedings, the Director of Fisheries agreed to promulgate the regulations ordered by the federal court, and a motion to show cause why the Director should not be held in contempt of the federal court was dismissed (Transcript of August 30, 1977, at 3-5).

2. *Injunctions against individual fishermen*

Although the State had finally promulgated the regulations required by the federal court, the holdings of the state courts, including the Washington

Supreme Court, made it impossible for the State to enforce those regulations. At several hearings before the federal court, the State's Assistant Attorney General admitted as much, noting that the only way the regulations could be enforced would be for the court to enter an injunction running directly against non-Indian fishermen and to punish violators through the contempt process. (See, *e.g.*, Transcript of August 25, 1977, at 59-63; Transcript of August 26, 1977, at 31-33, A. 514-515; Transcript of August 30, 1977, at 20-21.)

Accordingly, on August 31, 1977, the district court entered a temporary restraining order directed against all reef net, gill net, and purse seine fishermen licensed by the State of Washington, the Puget Sound Gillnetters Association, the Purse Seine Vessel Owners Association, the Grays Harbor Gillnetters Association, and all persons in active concert or participation with them, to prevent them from fishing in violation of the state regulations adopted pursuant to the federal court's orders. In support of the TRO, the court found (in part on the basis of State's own representations) that the State's inability to enforce its regulations "will lead to a breakdown of law and order in the waters of the case area, the substantial denial of federally guaranteed treaty fishing rights and will endanger the preservation of the fishery resource." To effectuate the TRO, the court required non-treaty fishermen to call the Fisheries "hot-line" (a toll-free recorded message which had been operated by the State for several years) to ascertain whether or not the area in which they intended to fish was open to them. State licensees found fishing

in closed areas after having received actual notice of the court's order were to be ordered to show cause why they should not be held in contempt of court (78-119 Pet. App. A-90; 78-139 Pet. App. E-1 to E-3).

Attorneys for the non-treaty fishing associations (petitioners in No. 78-139) were served with notice of the TRO as soon as it was entered. In addition, they were served with notice of the government's request for a 10-day extension of the TRO (which was granted) and with notice that the hearing on the government's motion for a preliminary injunction would be held on September 22, 1977.[15]

Despite this notice, no representative of the non-treaty fishermen attended. The State of Washington opposed entry of the preliminary injunction, although the evidence made it clear that the State did not intend to enforce against illegal non-treaty fishing (A. 519). State enforcement officers showed full knowledge of, but little concern over, the extent of illegal non-treaty fishing (see, *e.g.*, A. 599-600). After consideration of the evidence, United States District Judge Morrell Sharp, on September 22, 1977, entered a preliminary injunction against continued non-treaty fishing in violation of the allocation order, and ordered that a hearing be held on September 27, 1977, to consider extension of the preliminary injunction (78-119 Pet. App. A-79).[16]

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[15] See Supplemental Memorandum for the United States, filed on October 11, 1977, in Ninth Circuit No. 77-3129.

[16] Judge Sharp's five-day preliminary injunction was entered during a period when Judge Boldt was out of the country.

On September 23, 1977, deputy United States marshals personally served Judge Sharp's injunction, as well as notice of the September 27 hearing, on the presidents of the Purse Seine Vessel Owners Association and the Puget Sound Gillnetters Association.[17] The United States also mailed the same documents to the attorneys for the two associations.[18] In addition, National Marine Fisheries Service agents personally served the September 22 injunction and notice of the September 27 hearing on more than 220 non-treaty fishermen, either by handing a copy to the individual or by affixing a copy to the fishing vessel. Repeated radio voice broadcasts were made by the Coast Guard and others regarding the substance of the preliminary injunction; the events received widespread media coverage; and federal officials personally attended fishermen's meetings to read, explain and distribute copies of the September 22 injunction which set the date of the hearing that was to follow.[19]

Despite the publicity of the September 27 hearing, no non-treaty fishermen or representatives of the petitioner associations appeared to contest renewal of the preliminary injunction. However, counsel for

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[17] Ninth Circuit Record in No. 77-3654, at R. 1160-1161.

[18] See Affidavit attached to Supplemental Memorandum for the United States, *supra*, note 15.

[19] See affidavits attached as Exs. D, E, F, G, H and I to Supplemental Memorandum of Respondent Puget Sound Indian Tribes, filed October 13, 1977, in Ninth Circuit No. 77-3129.

the State of Washington was present at this and all other enforcement-related hearings. At the conclusion of the hearing, the district court determined that extension of the preliminary injunction was required. Accordingly, the court on that date entered an order that expressly prohibited all net salmon fishing in certain specifically described geographic areas except during such times and in such specific waters as were opened by regulations conforming to the court's prior orders. The order further enjoined those persons and entities named in the August 31, 1977, TRO from engaging in taking, possessing, or selling salmon of any species taken from the described waters unless such person had first ascertained from the telephone "hot-line" that the area to be fished was open for fishing by non-treaty fishermen at the time the individual intended to fish (78-119 Pet. App. A-89 to A-92).

The order directed the State of Washington immediately to commence service by certified mail, return receipt requested, of the preliminary injunction on all state-licensed commercial salmon net fishermen and to furnish the court with proof of service or written statement of the reason for the inability to serve any particular licensee. The United States, through the Coast Guard, the National Marine Fisheries Service, and the Marshals Service, was also authorized to serve copies of the preliminary injunction. Finally, the State of Washington and the United States were directed to cite any fisherman who, having received notice of the order, thereafter

fished illegally, to appear before the court to be ordered to show cause why he should not be held in contempt (78-119 Pet. App. A-9).

The September 27 order governed enforcement for the remainder of the 1977 season.

3. *Appellate proceedings*

The non-treaty fishermen sought review of the enforcement orders by filing a petition for a writ of mandamus in the United States Court of Appeals for the Ninth Circuit. At approximately the same time, the State of Washington appealed from all of the district court's orders relating to the 1977 season. The court of appeals permitted the non-treaty fishermen to intervene in the State's appeals, and the appeals and the mandamus proceeding were consolidated.[20] On April 24, 1978, the court of appeals issued its opinion in these consolidated Washington Fishery cases, in which it affirmed the district court in all respects (78-119 Pet. App. A-1 to A-28).

In its Washington Fishery decision, the court of appeals described the background against which it reviewed the district court's implementation orders (78-119 Pet. App. A-3):

[20] These cases were also consolidated with an appeal and a mandamus proceeding seeking review of similar orders entered by the United States District Court for the District of Oregon to implement the prior decisions in *Sohappy* v. *Smith*, 302 F.Supp. 899 (D. Ore. 1969), and *United States* v. *Oregon*, 529 F.2d 570 (9th Cir. 1976). No party to the Oregon litigation has sought review in this Court, although the court of appeals' disposition of that matter was identical to its disposition of the Washington Fishery case.

> The state's extraordinary machinations in resisting the [1974] decree have forced the district court to take over a large share of the management of the state's fishery in order to enforce its decrees. Except for some desegregation cases [citations omitted], the district court has faced the most concerted official and private efforts to frustrate a decree of a federal court witnessed in this century. The challenged orders in this appeal must be reviewed by this court in the context of events forced by litigants who offered the court no reasonable choice.

The court then reaffirmed the validity of the district court's treaty interpretation (78-119 Pet. App. A-3 to A-9).[21]

The court also rejected petitioners' contention that in allocating the 1977 harvest the district court had exceeded the intent of its original decision, which called only for an equal division of fishing opportunity and did not purport to guarantee the Indians specific numbers of fish (78-119 Pet. App. A-11 to A-13). The court held that "[c]onsidered in light of the record as a whole, the orders allocate only the opportunity to take fish. That allocation can best be expressed and enforced, of course, by numbers of fish

[21] In concurring opinions, Judges Wallace and Kennedy stated that "it has not been clearly demonstrated that the rule of fifty percent apportionment is a necessary and proper implementation of [the Indians'] treaty rights" (78-119 Pet. App. A-28). Nevertheless, both judges considered the decision in this case to be required by the court's prior decision in *United States* v. *Washington*, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976).

taken" (78-119 Pet. App. A-11 n.6). Finally, the court of appeals rejected the claim that an allocation of fishing rights among Indians and non-Indians pursuant to the treaties constitutes a denial of equal protection (*id.* at A-6 to A-8). The rights of the treaty tribes are based on their historical status as the successors to sovereign entities and not on their race (*ibid.*).

The court then turned to the questions of enforcement. It affirmed the district court's injunctions against the non-treaty fishermen, holding that, even though the fishermen were not parties to the litigation, they "are in privity with the [State of Washington]" and may thus properly be bound by the district court's orders (78-119 Pet. App. A-19 to A-20). The court of appeals concluded that "the district court had authority to act against the fishers directly when it appeared that the state was unable to do so" and that the fishermen "are subject to penalties for contempt if they have actual knowledge of the court's orders and violate them" (*id.* at A-20).

4. *The 1978 Enforcement Order*

The State of Washington's inability to manage its fisheries and enforce regulations to comply with the federal court decisions was unchanged at the end of the 1977 fishing season. Accordingly, the United States and the tribes again sought an injunction against the non-treaty fishermen. Notice of the hearing at which this injunction was sought was personally served on all licensed commercial fishermen

in the State of Washington and on petitioners. A number of non-treaty fishermen participated in the hearing. The non-treaty associations again chose not to attend.

On June 6, 1978, the district court issued an enforcement order to govern during 1978 and subsequent fishing seasons (78-139 Pet. App. C-1 to C-5). In all material respects, the 1978 Enforcement Order (which is before this Court before judgment in the court of appeals) is identical to the 1977 Enforcement Order reviewed and affirmed by the court of appeals in the Washington Fishery case. Like the 1977 order, the 1978 Enforcement Order enjoins all non-treaty fishing except for fishing conducted in accordance with procedures established by the court (*id.* at C-2, C-3). Violations of the court's orders are punishable by contempt (*id.* at C-4).[22]

E. Litigation And Regulation Respecting The Fraser River Salmon Runs

For the sake of clarity, we deal separately with the proceedings relating to the salmon runs originating in the Fraser River in Canada, insofar as those runs are harvested in the Strait of Juan de Fuca and upper Puget Sound. As we have noted, the district court, in its original decision, found that certain of the coastal treaty tribes traditionally fished these runs and that their right to do so was protected by the treaties negotiated with those Indians.

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[22] The district court also issued allocation orders in 1978, comparable to similar orders issued in 1977 (see pages 24-25, *supra*). None of those orders is before the Court.

The complicating factor here is the Convention of May 26, 1930, between the United States and Canada, 50 Stat. 1355, as amended by 8 U.S.T. 1058. The Convention provides for an equal division of the catch of Fraser River salmon between Canadian and American fishermen and establishes the International Pacific Salmon Fisheries Commission (IPSFC) to implement the agreement. 8 U.S.T. 1060. The Commission proposes regulations each year to govern the time and manner in which Fraser River salmon may be taken by the fishermen of each country. These proposed regulations become effective on approval by each nation. *Ibid.* Enforcement of the regulations within the United States is governed by the Sockeye Salmon or Pink Salmon Fishing Act of 1947, 16 U.S.C. 776 *et seq.* Section 776d of the Act directs the President to designate a federal agency responsible for enforcement. That agency (the National Marine Fisheries Service) may, in turn, authorize the State of Washington to act as the enforcing agent (16 U.S.C. 776d). Pursuant to this statutory scheme, Washington has for many years enacted the Commission's regulations verbatim into state law and enforced them as state law.

In the original litigation, the State of Washington argued that the Indian treaty rights with respect to the Fraser River runs had been abrogated by the international Convention. The United States, on the other hand, took the position that the Convention was not intended to affect the domestic allocation of fishing opportunity within the United States, and that nothing in the Convention conflicted with the tribes'

rights to harvest a fair share of the United States' portion of the Fraser River fishery. Both the district court and the court of appeals agreed that the Convention with Canada neither explicitly nor implicitly repealed the Indian treaties (A. 214, 53-54). Both courts held, however, that all fishermen, including treaty Indians, must comply with the Commission regulations.

Thereafter, the United States attempted, through its membership on the Commission and through diplomatic channels, to have the Commission alter its regulations to permit a special Indian fishery within the United States' entitlement. Because these efforts were unsuccessful, the United States, through the Department of State, withdrew its approval of a portion of the Commission's regulations for the 1975 season (78-119 Pet. App. A-122).

1. *The International Fishery case*

At this point, further proceedings were undertaken in the district court which constitute the so-called International Fishery case.

a. The State Department advised the court that, in its view, the withdrawal action would not harm proper escapement or division of the catch between the two countries and that its effect on the Commission's program would be de minimis (Ninth Circuit Record in Nos. 75-2835 and 76-1092, at R. 129). The State Department further advised that the withdrawal action removed any impediment caused by the Commission's prior regulations to implementation of a special treaty fishery (*ibid.*).

Following these representations, the district court, at the request of the United States and the tribes, ordered the State of Washington to restructure its regulations (which had merely incorporated the Commission regulations) to permit a special treaty fishery for the United States' share of the Fraser River runs (78-119 Pet. App. A-105 to A-124). Mechanically, this was to be accomplished by allowing treaty Indians to fish with any type of gear whenever United States Convention waters were open to American fishermen, thus effectively increasing the fishing time available to treaty Indians.[23]

In issuing this order, the district court took note of the diplomatic actions and, in light of them, found as follows (78-119 Pet. App. A-121 to A-122):

> In light of the need to provide for Indian treaty fishing rights, and with regard to the management scheme of the Commission, of all of the alternatives presented to the Court and practically available to this Court at this time for meeting that need, the one which would cause the least disruption to the Commission's management scheme and to the non-Indian fishery and which would not violate the responsibilities of the United States under the Convention would be [the] one allowing treaty Indians to fish with any gear whenever the Commission's regulations would allow fishing by any United States fishermen in Convention Waters.

[23] In addition to the gear flexibility order described in the text, the district court also entered an order designed to permit the Swinomish Indian Tribal Community to catch chinook salmon in IPSFC waters at times when those waters were closed to American fishermen, so long as they used nets of a size too large to take more than an incidental catch of pink or sockeye salmon (78-119 Pet. App. A-125).

The court concluded that the United States' withdrawal of approval of the Commission's gear regulations was valid, that there was thus no impediment to a gear flexibility regulation, that the treaty Indians must be afforded an opportunity to take up to 50% of the American harvest, and that the court had jurisdiction to order the gear flexibility regulation (*id.* at A-123 to A-124).

b. An action was promptly commenced in the Thurston County Superior Court seeking to have Judge Boldt's injunction declared unlawful. *Purse Seine Vessel Owners Association* v. *Moos*, No. 52881. On July 23, 1975, the county court issued a preliminary injunction requiring the State to suspend the regulations it had promulgated in compliance with the federal district court's injunction. The State complied with the state court's preliminary injunction and repealed the regulations. On July 31, 1975, the State repromulgated the gear flexibility regulation in response to a further order of the district court. On August 1, 1975, the state court amended its preliminary injunction of July 23, 1975, to require suspension of the new gear flexibility regulation. The State again complied with the state court order.

On August 6, 1975, at a previously scheduled hearing at which all parties were present, the federal district court granted the United States Attorney's oral motion to stay the state court proceedings and di-

rected the State to repromulgate the gear flexibility regulation repealed on August 1, 1975 (Ninth Circuit record in Nos. 75-2835 and 76-1092, at R. 163-164). The court also denied the State's motion for a stay of this order (*ibid.*).

Although it had received notice of the stay, the state court nevertheless proceeded to render judgment on the merits. On September 19, 1975, the state court issued its final judgment, holding (1) it should not have been stayed and did not feel itself bound by the federal court's injunction against further proceedings; (2) under state law, the Fisheries Department may not adopt regulations which vary from or expand upon the IPSFC regulations; (3) the United States' withdrawal of its approval of the Commission's gear regulations was ineffective; and (4) the gear flexibility regulation was therefore invalid under state law. Subsequently, the Washington Supreme Court affirmed the trial court in *Purse Seine Vessel Owners Association* v. *Moos*, 88 Wash.2d 799, 567 P.2d 205 (1977).[24]

c. Washington appealed from the district court's orders pertaining to the 1975 season. On April 24, 1978, the court of appeals dismissed the State's appeal as moot (573 F.2d 1118, 78-119 Pet. App. A-29 to A-33). First, the court of appeals noted that the district court's order pertained only to regula-

[24] No party has sought review of that decision in this Court, although the holding is the same as that reached in *Fishing Vessel II* and *Gillnetters*.

tions for the 1975 season and had therefore lapsed (78-119 Pet. App. A-30). Furthermore, the court determined that the case was not one "capable of repetition, yet evading review," because (as we detail in a moment) the IPSFC regulatory system that was in effect during the 1975 season has since been completely altered by the United States (*id.* at A-31).

2. *Implementation during the 1977 and 1978 seasons*[25]

a. In March 1977, the United States secured the Canadian Government's agreement to a proposal for the 1977 IPSFC regulations which would have provided extra fishing time for treaty Indians. The Commission, however, refused to adopt the proposal. Instead, the IPSFC adopted its staff's recommendation for a two-day per week fishery for all United States fishermen, with no provision for the Indians' treaty rights. Accordingly, the United States, through the Department of State, advised the Government of Canada that the United States would consider achieving the same result contemplated by the government-to-government agreement through the exercise of its authority under Article VI of the Convention, as amended, to approve the IPSFC's proposed 1977 regulations only as applied to non-Indians. Fishing by treaty Indians would be gov-

[25] There is no issue before this Court concerning the validity of the 1977-1978 regulatory system. We describe it in detail only for the purpose of demonstrating that the situation occurring in 1975 is not likely to recur. See pages 76-77, *infra*.

erned by separate federal regulations providing the Indians with extra fishing time.[26]

Canada did not, and to date has not, protested such unilateral action by the United States. Canada did stress the importance of regulating any special Indian fishery adopted by the United States in a manner consistent with the objectives of the Convention.

On June 1, 1977, the IPSFC forwarded to the Department of State for United States approval its proposed 1977 regulations. On June 17, 1977, the Department of State announced United States approval of the IPSFC's 1977 regulations "except as to U.S. Indians who are entitled to exercise fishing rights by virtue of treaties with the United States in U.S. Convention waters and are fishing in accordance with federal regulations providing for the exercise of such fishing rights." The Department of State advised both the Canadian Government and the IPSFC that treaty Indians would fish pursuant to regulations of the Department of the Interior and that such regulations would ensure that the Indian fishery proceeded in a manner consistent with the basic objectives of the Convention.

[26] This is quite similar to the Canadian Government's regulation of subsistence fishing by Canadian Indians, which has always been excluded from IPSFC coverage. In recent years, this Canadian Indian subsistence fishery has grown substantially, amounting in 1976 to approximately 300,000 fish. American Indian fishermen, both commercial and subsistence, that year caught a total of 80,000 fish. See *Purse Seine Vessel Owners Association* v. *United States Department of State*, 584 F. 2d 931, 934 (9th Cir. 1978).

b. On June 17, 1977, the Department of Commerce adopted as federal regulations the IPSFC's 1977 regulations for United States Convention waters, with a caveat stating that the regulations would not apply to Indians exercising treaty-secured fishing rights (42 Fed. Reg. 30841). On June 21, 1977, the Department of the Interior, pursuant to its authority over Indian affairs (25 U.S.C. 2 and 9), published separate regulations for treaty Indians fishing in IPSFC waters (42 Fed. Reg. 31450). Structurally, Interior's regulations for treaty Indians were virtually identical to Commerce's (*i.e.*, the IPSFC's) regulations for non-Indians; however, Interior's regulations authorized extra fishing time for treaty Indians.[27] Unlike the situation in prior years, the United States did not ask the State of Washington to adopt the 1977 Commission regulations as state law. Moreover, the National Marine Fisheries Service did not delegate its enforcement powers under the Sockeye Salmon Act to the State. Instead, the regulations for both treaty and non-treaty fishermen were enforced by the National Marine Fisheries Service and the United States Coast Guard.

c. On June 24, 1977, suit was brought to enjoin the United States from providing extra fishing time for treaty Indians fishing in IPSFC waters. *Purse Seine Vessel Owners Association* v. *United States Department of State*, Civil No. C77-471M (W.D.

[27] Interior's regulations basically adopted the United States' proposal which the Government of Canada accepted in March 1977.

Wash.). The State of Washington was not a party to the litigation, nor did it seek to participate in the case. Following briefing and oral argument, the district court (Judge Walter T. McGovern) denied plaintiffs' motion for a preliminary injunction on July 5, 1977. After noting that the United States, in providing the treaty Indians with additional fishing opportunities, was endeavoring to abide by its treaty obligations, the court held that the IPSFC's proposed regulations were of no effect unless approved by both governments. Since the United States had refused to approve the regulations as applied to treaty Indians, the court concluded that there were no valid Commission regulations applicable to them.

The court further held that the Convention does not authorize the IPSFC to direct the domestic allocation of the fish allotted to the United States. Thus, the court concluded that an "emergency order" issued by the IPSFC after the United States refused to approve the proposed regulations for treaty fishermen, in which the IPSFC stated that its regulations applied to all citizens of the United States, was of no effect because it was designed to effect domestic allocation within the United States, a subject not within the authority of the IPSFC.

Finding that plaintiffs had not demonstrated a strong likelihood of success on the merits, and that the grant of a preliminary injunction would harm the treaty Indians far more than the denial of such relief would harm the plaintiffs, the court concluded that the public interest was best served by permitting the

government to honor its treaty obligations to the Indians.[28]

Plaintiffs appealed. By order dated September 27, 1977, the court of appeals refused to grant injunctive relief (9th Cir. No. 77-2968) and indicated that it would issue an opinion at a later date. On October 26, 1978, the court issued its opinion, in which it held that the district court had not abused its discretion in denying injunction relief. 584 F.2d 931. The court declined to address the substantive issues in the case, noting that the underlying dispute concerning allocation of fishing opportunity is pending before this Court.

d. In 1978, the United States again declined to approve the IPSFC's proposed regulations as applied to treaty Indians, and instead, as in 1977, promulgated separate regulations authorizing extra treaty fishing time. Again, the State of Washington neither enacted the 1978 regulations into state law nor had any authority to enforce such regulations.[29] The matter continues to be administered under federal regulations. 43 Fed. Reg. 26737, 27187.

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[28] Later in the 1977 season, plaintiffs filed a second motion for a preliminary injunction. Holding that no new issues had been raised, the district court denied this motion on August 10, 1977.

[29] The same parties who brought suit in 1977 filed a second suit in 1978, in which they raised the same challenges to the United States' action. *Purse Seine Vessel Owners Association*, v. *Bureau of Oceans*, Civ. No. C78-578 (W.D. Wash.). No action has been taken in that case. It, as well as the merits of the 1977 suit, are still pending in the district court.

ARGUMENT

INTRODUCTION AND SUMMARY

The cases before the Court reflect a controversy of unusual intensity. That is because the anadromous fishery of Washington is at once one of the most valuable resources of the State and the traditional cultural and economic mainstay of the Indian tribes in the area. Not surprisingly, disputes over the right to share in the now limited fishery have raged, in and out of court, for many decades.

At length, in a suit initiated by the United States against the State, the matter came before the district court for a final and complete adjudication of the claims of Indian fishermen. They were invoking treaties which reserved their "right of taking fish", albeit "in common with" others, in areas ceded to the United States. After the fullest consideration, the trial judge apportioned the resource so as to afford treaty fishermen an opportunity to catch half the fish. The decision was affirmed on appeal and this Court declined review.

Unfortunately, that did not close the debate. Conflicting decisions were obtained from the state courts, enforcement proved extremely difficult and the district court found it necessary to issue many additional orders. Some of these are now challenged in this Court. The result is a record of almost unmanageable proportions and a complex series of issues, multiplied by the ingenuity of counsel exploiting every possible argument to fault the district court.

In this situation, we have deemed it our task to attempt to focus on the essential points and to state our submission without undue embroidery. As we analyze the matter, there are three broad questions presented by these cases.

1. At the outset (*infra*, pages 46-53), we submit that this Court may properly invoke the doctrine of finality to reject challenges to the district court's basic apportionment decision—which became final when certiorari was denied in 1976. Insofar as the state courts disregarded that decision, we urge reversal of the judgments on the ground that they were entered without jurisdiction and in violation of the most fundamental rules of judicial comity.

If the Court accepts this submission, there is no occasion to consider, on the merits, the district court's Final Decision No. 1. We defend it only out of abundance of caution.

2. Part II of our brief (*infra*, pages 54-77) addresses (unnecessarily, as we believe) the fundamental question how the treaties of 1854 and 1855, insofar as they reserve off-reservation fishing rights, should be implemented in the changed conditions of today. We look to the historical setting as an aid to discovering the original understanding. In light of the tribal dependence on fishing, both for subsistence and commercial purposes, it seems to us inconceivable that the Indians can be deemed to have agreed to be "crowded out" of their traditional fisheries merely because, in a later time, the number of non-Indian fishermen multiplied. The pledge given

in the treaties, we believe, requires that Indian fishing at "usual and accustomed grounds" be accorded special protection. In the circumstances now prevailing, that can only be done by allocating to treaty fishermen a discrete percentage of each fish run. The natural reading of the treaty provision fixes that share as 50%. That result, we believe, is confirmed by considering the reasonable needs of the treaty tribes. Since experience has shown that the 50% allocation ordered does not exceed that standard, we conclude that it ought to be approved.

3. Finally, we turn to the enforcement issues (*infra*, pages 78-84). Our discussion focuses on three challenge actions of the district court: the direction to state officials to implement the court's apportionment, notwithstanding state law obstacles; the court's later assumption of direct supervision of the Indian fishery; and the injunction directed against individual fishermen, treating them as bound by the allocation ruling. In each instance, we argue that, confronted with the special difficulties of this controversy, the court was justified in issuing the several orders.

I

FINALITY AND COMITY

The question arises how far, if at all, this Court should reexamine, however indirectly, the basic allocation decision underlying all the subsequent proceedings in the case. We refer to the district court's ruling of February 12, 1974, commonly known as

"Final Decision No. 1." For our part, we believe the Court ought not accept the invitation to undertake that task.

So saying, we do not forget that the Court has determined to review both the federal and state cases; nor that we acquiesced in that course. But the grant of certiorari does not require the Court to reconsider all that has been decided in the controversy. Presumably, the Court was moved to bring the cases here because of the intolerable impasse resulting from the state court rulings frustrating the enforcement efforts of the federal court. Of course, the conflict must be resolved, and, in light of past events, this Court must speak directly to the Supreme Court of Washington and the other participants in the controversy. That does not mean, however, that the basic issues in the controversy must be reheard de novo.

The Court, we submit, is entirely free to apply the doctrine of finality to affirm the district court's Final Decision No. 1, as upheld by the court of appeals in 1975, and, on like reasoning, to reverse the Washington Supreme Court rulings here on certiorari. That starting point would leave issues enough for decision "on the merits"—notably, all the enforcement questions, involving the responsibility of state officers and the propriety of directly enjoining non-treaty fishermen.

A. Finality Of The District Court Ruling

1. The district court reached its basic decision only after the most extensive proceedings. Almost four years had elapsed since the United States ini-

tiated the action. Every opportunity was given for discovering and developing evidence, followed by a trial lasting more than three weeks. All parties filed substantial briefs, compendiously discussing the legal issues. The court took ample time to consider and ultimately rendered an elaborate ruling, including more than 250 findings of fact. Thereafter, the court of appeals heard the case and affirmed in a 20 page opinion. And this Court denied petitions for certiorari.

In normal course, that would have been the end of the matter. As it happens, the district court has had occasion to ratify its decision in many subsequent orders, the court of appeals has once again affirmed, and the case has returned to this Court. In these circumstances, although the doctrine of res judicata is not strictly applicable, we submit that the policies underlying that rule may appropriately guide this Court's approach.

2. Indeed, it would be difficult to imagine a situation in which reopening the basic decision were, on the one hand, less justified, and, on the other, more wasteful and potentially disruptive. The State of Washington and its privies (which, as we elaborate in due course, include the non-Indian fishing associations) cannot remotely suggest that they have not had their day in court. It would be uniquely extravagant to allow the very substantial investment made by the courts and the parties in achieving a working plan to be set aside by a new challenge. Nor should this Court lightly assume the burden of reviewing

the complex record in the case. What is more, in the peculiarly sensitive context of this litigation, finality offers the only prospect of lasting co-existence; to invite further proceedings, after more than eight years, to contest what had been thought settled, imperils the precarious accommodation now achieved.

3. There is another consideration arguing against reconsidering the fundamental holding of the case. The matter is now here only because flagrant disobedience of outstanding orders and the irresponsible intervention of the state courts required the district court to enter additional orders which furnished new vehicles for appeal and, ultimately, for fresh certiorari petitions, now made more compelling by an unseemly conflict between federal and state rulings. To reopen the basic holding of the case in this setting would be to reward illegality. This Court is not bound to lend itself to such an exercise.

B. The Breach Of Judicial Comity And Jurisdictional Principles In The State Court Proceedings

In our submission, the state court judgments now here on certiorari ought never have been entered. At all events, they cannot require this Court to reconsider on the merits matters otherwise finally adjudicated.

1. At the time the state cases were filed, the apportionment issue had been clearly decided by a final judgment of the federal court,[30] running against the

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[30] The *Fishing Vessel* suit was filed in the Thurston County Superior Court very shortly after the district court's Final Decision No. 1 and the accompanying injunction were issued

State of Washington and its privies. That ruling was binding on the State's citizens, just as it was on the members of the Indian tribes party to the suit. The whole object of the proceeding had been to apportion the resource between the treaty Indians and the non-Indian fishermen of Washington. Each group had been fully represented by its sovereign and must abide the result.

To be sure, it can be argued that two or more classes of non-Indian fishermen had somewhat different interests. But the same can be said of those who appropriate water from an interstate river. Yet, all users within a State are bound by the judgment against their sovereign, because their common interest outweighs any conflict between them. See, *e.g.*, *Wyoming* v. *Colorado*, 286 U.S. 494, 508-509, and cases cited at n.5 (1932). The same principle governs this case.[31] Any other conclusion would permit an indefinite number of lawsuits over the same question until every individual fisherman, Indian and non-Indian, had litigated. And that, of course, has never been permitted. See *City of Tacoma* v. *Taxpayers*, 357 U.S. 320, 340-341, and cases cited at 341 (1958); *New Jersey* v. *New York*, 345 U.S. 369, 372-373 (1953).

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in early 1974. The judgment of the state supreme court in that case was rendered well after this Court denied certiorari in the federal proceedings. *Gillnetters*, the original mandamus action, was both filed and decided by the Washington Supreme Court after those denials of certiorari.

[31] Thus, we assume the ruling in *Idaho ex rel. Andrus* v. *Oregon*, leave to file granted, 429 U.S. 163 (1976)—if that case proceeds to judgment—will be binding on the fishermen of the three States involved, including the Washington associations now before the Court.

It follows that the State, as defendant, could have defeated the suits instituted by the fishing associations by pleading the federal court judgment in bar. *City of Tacoma* v. *Taxpayers*, *supra*; *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938). The State's failure to interpose such an objection is a strong indication that the parties were not true adversaries. Indeed, in the first *Fishing Vessel* decision, the Washington Supreme Court itself stressed the fact that no party had raised or discussed the effect of the conflicting federal ruling and, partly on that ground, declined to give an "advisory opinion." See *supra*, pages 21-22. Plainly, both cases were "friendly suits." That alone would justify vacating the resulting judgments without reaching the merits. *United States* v. *Johnson*, 319 U.S. 302 (1943).

2. There was, moreover, another infirmity. Arguably both the United States and the tribes were indispensable parties; certainly, the suits could not properly proceed in the absence of both. Yet, each of the tribes, as well as the United States, enjoyed sovereign immunity. Since there was no waiver—nor, indeed, an attempted joinder—this defect required dismissal of the actions, regardless that no objection was made. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Minnesota* v. *United States*, 305 U.S. 382, 386-389 (1939). See, also, *Minnesota* v. *Hitchcock*, 185 U.S. 373, 382 (1902).

3. More fundamental, however, is the failure of the state courts themselves to avoid the unseemly conflict. As one member of the Washington Supreme Court said, that court bears "significant responsibility" for a "controversy [which] has escalated to the point at which the lives and property of individual citizens are in peril." *Fishing Vessel II*, 77-983 Pet. App. B-13, B-27 (Utter, J., dissenting). One is reminded of equally sensitive issues in which the attempted intervention of state courts over a subject-matter already pending in, or adjudicated by, federal courts aggravated the confrontation. *E.g.*, *United States* v. *Louisiana*, 351 U.S. 978 (1956); *Bush* v. *Orleans Parish School Board*, 187 F. Supp. 42, 43, 46 (E.D. La. 1960), aff'd, 365 U.S. 569 (1961).

Here, as there, the courts of the State should have declined to entertain the cases, or, at the least, should have eschewed reconsidering issues finally resolved by the federal courts. See *Supreme Tribe of Ben-Hur* v. *Cauble*, 255 U.S. 356 (1921), re-affirmed in *Mitchum* v. *Foster*, 407 U.S. 225, 235-237 (1972). The proper response, we submit, was that given by Justice Horowitz (joined by two other Justices) in the *Gillnetters* case when the State Supreme Court was asked to mandamus the Washington Director of Fisheries "to take action which [would] violate the injunction entered in *United States* v. *Washington*" (77-983 Pet. App. D-17, D-19 to D-21):

> Under the circumstances presented, if this court is to adhere to the rule that the office of a writ of mandate is to enforce a duty owing,

> rather than to direct its violation and if due regard is had to protect the integrity of the federal and state constitutional structure of which this court is a part, then this court must deny the writ * * * [and, for] [t]he same reasons, * * * [refrain] from inviting the Director of Fisheries to accomplish the same result by undertaking to do those things on his own violative of the federal court injunction.

A fair summary of the state court cases now pending here must recognize that the plaintiffs were seeking to circumvent a federal judgment by resorting to another forum, with a friendly adversary; that the State itself was willing to participate in the maneuver; and that the state courts, disregarding all principles of comity, lent themselves to this impermissible collateral attack on Final Decision No. 1. This Court, we suggest, ought not allow such tactics to succeed.

The present submission, if accepted would leave only the enforcement issues, discussed in Part III of our brief, *infra*, pages 78-84. The pages that immediately follow—treating the apportionment ordered in 1974 and implemented since that decision—are relevant only in the event the Court declines to accord finality to Final Decision No. 1.

II

APPORTIONMENT

If this Court undertakes to review the district court's basic decision on the merits, the central question is whether that court permissibly implemented the federal treaty provisions defining the off-reservation fishing right of the tribes by allocating to them a roughly equal share of the fishery in dispute. The answer depends, in part, on the original understanding of those who executed the treaties in the mid-nineteenth century, and, in other part, on the circumstances now prevailing. We begin by searching out the historic intent.

A. The Historical Setting And The Original Understanding

1. In 1854 and 1855, when all the treaties in suit were negotiated, the coastal tribes of the Washington Territory held very large tracts of land, stretching along the many rivers and streams of the area, from their sources to Puget Sound or the ocean, where they emptied. Fishing was the chief activity of the Indians. Fish was the staple of their diet. But the Indians also engaged in substantial commerce, selling or bartering fish to other tribes and to the white settlers. Indeed, commerce in salmon was then "the crux of the Indian economy in Western Washington" (A. 341-342). Each tribe had its preferred fishing locations, often at the mouths of the rivers or upstream, sometimes in adjacent marine waters.

At the time, the runs of salmon and trout were plentiful. The Indian population was already much diminished, to somewhat less than 8,000. White settlers were no more than a quarter of that number. There was little need for conservation limits on fishing, although the tribes did protect their fisheries against destructive practices. Except for seasonal restrictions embodied in tribal customs, those who fished, Indian or white, did so as freely as they wished. In practice, however, the fisheries were exploited almost exclusively by the Indians. Few whites fished, depending rather on the more expert Indians to supply them.

Such was the setting when Governor Stevens came to negotiate treaties with the several coastal tribes of Washington. The government's objective was to acquire most of the Indian land for settlement. The Indians, for their part, were willing to relinquish all but small reserves, provided they would retain the right to fish in the ceded area. This was not a marginal point: as the Court noted long ago, fishing was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States* v. *Winans*, 198 U.S. 371, 381 (1905). Accordingly, they made clear their "strong desire * * * to retain the right to hunt and fish in accordance with the immemorial customs of their tribes." *Tulee* v. *Washington*, 315 U.S. 681, 684-685 (1942). Indeed, in some cases at least, the reservation of fishing rights was expressly made the sine qua non of any cession of tribal lands.

2. The upshot was the insertion in the several treaties of a provision reserving off-reservation fishing rights: "The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, * * *." *E.g.*, Treaty of Medicine Creek, Art. III, 10 Stat. 1132-1133. This, we must assume, carried out the representation made by Governor Stevens to the Indians when he said: "This paper secures your fish" (A. 331). For it is well-settled that in construing these treaties, one must eschew technical rules and consider how the Indians understood the promise made, resolving doubts in their favor. *United States* v. *Winans*, *supra*, 198 U.S. at 380-381; *Tulee* v. *Washington*, *supra*, 315 U.S. at 684-685. See, also, *Jones* v. *Meehan*, 175 U.S. 1, 10-11 (1899); *Winters* v. *United States*, 207 U.S. 564, 576-577 (1908); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Choctaw Nation* v. *United States*, 318 U.S. 423, 431-432 (1943); *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620, 630-631 (1970); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 174 (1973).

The obvious meaning of the treaty is that the Indians reserved the right—now formally confirmed—to fish as they had been, in all their accustomed locations. There was no new restriction as to seasons or methods of fishing, no limit on numbers, no curb on commercial catches. The Court has expressly recognized that "net fishing by these Indians for commercial purposes was covered by the Treaty." *Washington Game Dept.* v. *Puyallup Tribe* (*Puyallup II*), 414 U.S. 44, 48 (1973). The only difference was that, henceforth, the tribes could not exclude non-Indians from the fishing grounds—something which, in practice, they had never sought to do anyway.

Plainly, the Indians who relinquished most of their lands, but retained the fisheries, believed their "right of taking fish" was, in the words of the treaties, "secured" against future encroachments. The United States, they reasonably supposed, had pledged that the tribal fishing right would not be taken from them by the white community, whether acting privately or publicly—a distinction not likely appreciated by the Indians at the time. Indeed, this Court has consistently upheld this understanding. *United States* v. *Winans*, *supra*; *Seufert Bros.* v. *United States*, 249 U.S. 194 (1919); *Tulee* v. *Washington*, *supra*; *Puyallup Tribe* v. *Department of Game* (*Puyallup I*), 391 U.S. 392 (1968); *Puyallup II*, *supra*; *Puyallup Tribe* v. *Washington Game Dept.* (*Puyallup III*), 433 U.S. 165 (1977). See, also, *Antoine* v. *Washington*, 420 U.S. 194, 207 (1975); *United States* v. *Taylor*, 3 Wash. Terr. Rep. 88 (1887).

The cases just cited settle that neither a private landowner by his fence or his "fish wheels," nor the State by its law or its license, can prevent Indian access to the fish at usual tribal fishing places. It is equally clear that private and public action which effectively prevents harvestable fish from reaching the same tribal fishing grounds is subject to a like

challenge. *Puyallup II.* This much, we may safely assume, both parties to the treaties would have unequivocally answered. The question remains, however, how one deals with a less than total abridgment of the right reserved and protected by the treaties.

3. For this purpose, it does not seem to us profitable to indulge the pretense that those who executed the treaties of 1854 and 1855 had in mind the rules of the English common law. Whatever legal erudition informed the government's negotiation, it goes without saying that the Indian chiefs had not the advantage of the *Commentaries* of Sir William Blackstone or those of Chancellor Kent. Moreover, if one were to invoke the arcane law of fisheries, the result would not be as petitioners assert.

It is argued that the fishery was viewed as a common, or public resource, where all might fish "without stint," as the English cases put it. See, *e.g., Goodman* v. *Saltash Corp'n* (1882), 7 A.C. 633, 645-646; *Attorney-General for British Columbia* v. *Attorney-General for Canada*, [1914] A.C. 153, 169-171. But that doctrine does not fit the historical setting. "Common fisheries" were those which, from time immemorial, had been deemed to belong to no one, were open to all, and from which no one could be excluded. In Roman and English law, that rule presumptively governed fishing in the sea and tidal rivers. Justinian, *Institutes*, lib. II, tit. I, secs. 1-5; Bracton, *De Legibus et Consuetudinibus Angliae*, lib. I, ch. XII, secs. 5, 6, 8; Britton, Bk. II, ch. II, s. 1; Y. B. 8 Edw. IV 18; *Lord Fitzwalter's Case*

(1673), 1 Mod. 105. That remains the modern law. *E.g., Attorney-General for British Columbia* v. *Attorney-General for Canada, supra*, at 171. This does not, however, describe the *localized* fisheries spoken of in the treaties, which were held exclusively by the tribes. Besides, at least until this century, there is no known instance of a public fishery being *created.* Despite the prohibition of Magna Carta, the tendency has been the other way: to recognize as privately appropriated fisheries that were once public. See, *e.g., Malcomson* v. *O'Dea* (1863), 10 H.L. Cas. 593.

We are dealing here, rather, with exclusive fisheries which, by agreement, are henceforth to be shared with another group. The more appropriate analogy would be to what English law terms a "common of piscary." In that event, the tribes, as grantors, would have conceded no more than a limited liberty of taking fish in their fishery, for purposes of sustenance only. See *Lord Chesterfield* v. *Harris*, [1908] 2 Ch. 397, aff'd [1911] A.C. 623.

But these conjectures are unreal. So far as we can determine, none of the treaty negotiators anticipated the need for restrictive regulations, whether to protect the survival of the run or to assure that both Indians and non-Indians enjoyed a fair share of the fishery. And it is accordingly somewhat artificial to construe the words "in common" as importing a specific body of law to resolve a contingency not envisaged.

It does not follow, however, that we must throw up our hands. Practical problems require solution,

and the courts must do their best to accommodate the original understanding to present conditions. Thus, although the tribal right was never intended to be circumscribed, we now know that it may be when necessary to preserve the resource. *Puyallup I, supra,* 391 U.S. at 398. Like considerations, we submit, justify an apportionment of the fishery between groups of fishermen when they cannot otherwise all have a fair opportunity of harvesting fish —albeit that, too, was not originally contemplated.

Nor does eschewing ready-made common law rules in answering a question never posed leave us wholly without guidance. On the contrary, it is tolerably clear, we believe, what the parties would have responded if today's problems had then been foreseen. As we elaborate in a moment, one must suppose a compromise. But it is not conceivable that the tribes would have agreed to lose both their lands and more than half their fisheries. We turn to those questions in the context of today's overcrowded fishery.

B. The Appropriateness Of Apportionment In Modern Conditions

Today, it need hardly be said, there are too many fishermen and too few fish. But that is not all. Until this Court intervened in the *Puyallup* cases and the district court in this case, the combined effect of private action and public regulation was to prevent or drastically curtail Indian fishing at traditional sites. And relations between Indians and non-Indian fishermen were severely strained. Nor was there strict

obedience to law on either side. What should be done? Petitioners answer with a plea for unrestricted competition, notwithstanding all the advantages that would give to the non-Indian community, with its far greater numbers, superior technology and more developed habits of ocean fishing. We submit the courts below properly rejected this view as inconsistent with the pledge of the treaties.

1. The proper solution for the new conditions was indicated by the Court as early as *Winans* and reiterated in *Puyallup*: "an adjustment and accommodation" of the rights of the Indians and of other fishermen. 198 U.S. at 384; 414 U.S. at 49. At least in circumstances like those presented here, this means that fish "which can be caught within the limits needed for escapement * * * must in some manner be fairly apportioned" between the two groups (414 U.S. at 48). Indeed, in its most recent decision implementing one of the treaties involved here, the Court expressly approved a percentage allocation of a fish run between Indian treaty fishermen as one group and all other residents as the other. *Puyallup III, supra,* 433 U.S. at 177.

These precedents would seem to foreclose the debate whether *some* form of apportionment between Indian treaty fishermen and other fishermen is appropriate in the conditions prevailing today. It is nevertheless argued that no apportionment is necessary, or indeed constitutionally permissible. Out of abundance of caution, we pause to consider that proposition before turning to the question how one computes the treaty share of the resource.

2. History, geography and biology combine to reject the suggested "first come, first served" rule, even if combined with "nondiscriminatory" regulations as to time and manner of fishing and size of catch, as a sufficient way of accommodating the claim of the treaty Indians. For all the appearances of even-handedness, such a formula is, in practice, grossly unfair to the Indians. We are not dealing with a resource confined to an inland lake or other restricted area, but with migratory fish harvestable either in marine waters or, later, as they are returning to their upstream spawning grounds. The traditional Indian fishing places mentioned in the treaties were primarily in the rivers or immediately adjacent marine waters. Hence, for most species, the approach advocated by petitioners would allow the harvestable stock to be "fished out" before it reached the "usual and accustomed grounds and stations" of the treaty tribes, leaving them nothing—unless only they were to "poach" on the fish that must escape in order to preserve the run.

It is no answer to say that the Indians are free to compete with other fishermen in Puget Sound, the Strait of Juan de Fuca or the ocean itself. The tribes reserved, and the United States guaranteed, more inland fishing rights. These cannot be destroyed merely because other fishing places remain more or less available to the Indians. No such alternative was thought sufficient when, in *Winans*, the Court confronted "fish wheels" that effectively gave non-Indians "exclusive possession of the [tribal] fishing

places" (198 U.S. at 382); nor when, in *Puyallup II*, the Court invalidated regulations that prohibited river net fishing and thereby permitted the fishery to be "entirely pre-empted by non-Indians" (414 U.S. at 48-49). On the contrary, as we have seen, in both cases the Court suggested an apportionment of the resource to assure the treaty Indians a proper share. So here.

3. It is not geography alone, however, that requires us to resist the approach of viewing the Indian treaty fisherman as no different from his non-Indian counterpart—entitled as an individual to an equal opportunity to take fish, but no more. The point was fully canvassed in this Court three-quarters of a century ago and squarely resolved. *Winans* expressly held that the off-reservation fishing rights secured by treaty are something more than those "any inhabitant of the Territory or State would have," and more than the Indians "would have without the treaty." 198 U.S. at 380. And, from that day to this, the Court has uniformly discussed the right of the Indians pursuant to treaty as requiring distinct recognition. Thus, the State today is free to limit or prohibit non-Indian fishing as it pleases, while it can restrict treaty rights only if application of an otherwise "reasonable and necessary" regulation to Indian fishing "is necessary in the interest of conservation." *Antoine* v. *Washington*, *supra*, 420 U.S. at 207.

In light of the Court's settled jurisprudence, it is no doubt unnecessary to probe the reasons for notic-

ing the special character of the Indian treaty fishing right. But the cause is not far to seek. As this Court stressed in *Winans* (198 U.S. at 381), the tribes were reserving rights enjoyed since immemorial times. They gave up most of the land adjoining their fisheries, retaining only an easement over it. They further agreed to admit others to their traditional fishing grounds, to fish "in common" with them. But, in light of their critical dependence on fishing, commercial as well as subsistence, it is inconceivable that the Indians were thereby acquiescing in a future when they could be "crowded out" by white fishermen as soon as the latter gained a numerical or technological superiority. That would empty of all substance the government's promise to "secure" their fishing against undue encroachment.

The upshot is that, although not exclusive, the fishing rights reserved by the tribes, and confirmed by the United States in the several treaties before the Court, *are* special. And that unique status of treaty fishermen requires separate consideration whenever the resource is inadequate to meet all needs. Indeed, one can read the treaties as according the Indians an absolute priority to satisfy all their needs, including their commercial fishery—other fishermen being entitled only to the residue, if any. Cf. *Antoine* v. *Washington*, *supra*, 420 U.S. at 207. Plainly, such a construction of the treaties would no more offend equal protection principles than the reservation of a fishery exclusively for Indians. *E.g.*, *Alaska Pacific Fisheries* v. *United States*, 248 U.S.

78 (1918). See *State* v. *Forge*, 262 N.W.2d 341 (Minn.) (1977), appeal dismissed, 435 U.S. 919 (1978). Cf. *United States* v. *Antelope*, 430 U.S. 641, 645-649 (1977).

We do not press the argument so far, however. The express denial of exclusivity embodied in the phrase "in common with all citizens of the Territory" requires some giving way to non-Indian fishermen. As the Court succinctly summarized the matter in *Puyallup II*, *supra*, 414 U.S. at 49, "[t]he aim is to accommodate the rights of Indians under the [t]reat[ies] and the rights of other people." That sentence tells us both that treaty Indians, in respect of their fishing rights, are different from "other people," and that, to some degree, they must make room for fishermen who do not enjoy their special status.

C. The Standard For Apportioning

What has been said requires an apportionment which preserves a distinct share of the fishery for treaty fishermen whenever their rights are in jeopardy; in circumstances like those presented here, that is the only practical way to honor their special rights. It follows also, of course, that the allocation to the treaty fishermen cannot be determined primarily on the basis of their relative numbers.[32] For,

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[32] Significantly, in the court of appeals, the State itself conceded that "it would not be fair to divide the harvest based strictly on number of fishermen." Br. at 51. As we have already noted (*supra*, page 9), in the district court, the Washington Department of Fisheries proposed a one-third share for the Indian treaty fishermen.

if the Indian portion were merely the aggregate of individual shares, computed on a strict per capita basis, the purpose of the apportionment would be defeated. As we have said, the right reserved by treaty cannot become so diluted by the increased number of non-Indian fishermen as to make meaningless the tribes' insistence on retaining it and the government's solemn pledge to secure it. Nor would such a result be consistent with the continuing Congressional solicitude to preserve those treaty rights. 18 U.S.C. 1162 (b); 25 U.S.C. 1321(b). See *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968).

1. In considering how to apportion, it is relevant to stress the *tribal* character of the fishing right reserved and secured by the treaties. Although, derivatively, the members enjoy the right (*Winans*, *supra*, 198 U.S. at 381), it appertains to the tribes, which may regulate its exercise. *Puyallup III*, *supra*, 433 U.S. at 178. See, also, *Menominee Tribe* v. *United States*, *supra*. Accordingly, any apportionment must consider the treaty Indians as a group, not as individuals. To do otherwise would be to forget that it was the tribes that signed the treaty and reserved fishing rights and that the government's promise of protection runs to the tribes as quasi-sovereigns.

The fact that the right belongs, in the first instance, to the tribes makes irrelevant the actual number of treaty Indians presently engaged in fishing. The tribal share cannot fluctuate according as it is harvested by many or few. Nor can it matter what internal rules the tribes may have established to govern fishing by the members. As the Court said in

Puyallup III, *supra*, 433 U.S. at 178, the State "has no interest in how the catch is allocated among the Indians."

2. Recognition that the fishing rights now in dispute were reserved by, and guaranteed to, the tribes, as such forecloses any argument for a *per capita* allocation of the fishery. But that is not all. It helps us to understand what the parties meant when they agreed that the fishery would be held "in common," and guides us in determining how the resource ought to be apportioned.

In 1854 and 1855, the Indian tribes were viewed as quasi-sovereigns, with whom it was deemed appropriate to execute a formal treaty. The United States was dealing with the tribes of western Washington as semi-independent nations, who enjoyed autonomous governmental prerogatives, whose chiefs were authorized to speak for their "citizens." Accordingly, it is appropriate to analogize the present case to one in which the United States was negotiating an agreement with a foreign state.

Let us suppose, for instance, that we had signed a convention with Canada concerning waters that were then within the exclusive domain of the United States, the agreement stipulating that, henceforth, American fishermen were to be entitled to fish in those waters "in common" with the citizens of Canada. In the event circumstances later required a more precise definition of relative rights because Canadians were "crowding out" our fishermen, what would be the result? We venture the opinion that,

in the absence of clear evidence of a different intent, an international tribunal would award half the fishery to each nation, without regard to the population of the two countries, or the number who actually fished, or whether the fishermen kept their profits.

Indeed, that is precisely the position consistently espoused by the United States in construing the Treaty of October 20, 1818, with Great Britain in respect of the Newfoundland fisheries. That agreement provided that "the inhabitants of the said United States shall have, forever, in common with the subjects of his Britannic Majesty, the Liberty to take fish of every kind" in specified areas. 8 State 248. John Quincy Adams, who as Secretary of State had been concerned with the terms of the treaty both before and shortly after its execution, later wrote of it as granting the United States "an equal share" of the fishery. J. Q. Adams, *Fisheries and the Mississippi* 184 (1822). That view was confirmed some years afterwards by Secretary of State Bayard who referred to the treaty as establishing a "tenancy in common." Letter No. 452, Nov. 6, 1886, For. Rel. 1886, 362. Professor Wharton used the same term. 3 *International Law Digest*, § 304 (1887). And, finally, our representation to the International Court in a 1906 case (which involved discrete issues) characterized the treaty as "fixing beyond question the equal measure and quality of right in the fisheries" (S. Doc. No. 870, 61st Cong., 3d Sess. 47 (1910).

This was, in effect, the approach of the court of appeals, invoking the analogy of co-tenancy, and of

the district court, more directly concluding that two parties holding "in common" presumptively enjoy equal shares. It is, we submit, the common sense reading of the treaty language. All analogies aside, the most natural inference, when there is an agreement involving only two parties who stipulate to share a resource "in common," is that, if worst comes to worst and apportionment is necessary, there will be an even division.

3. One would be justified, perhaps, in rejecting this natural construction if it produced a result wholly at odds with what we know about the situation of the parties when they reached their agreement or with modern conditions. But there is no such obstacle here. On the contrary, as the district court said, one must assume the Indians meant to reserve to themselves a fishery "which is sufficient to the fair needs of the tribes" (A. 195). And, at least in the area encompassed by this case, testing the apportionment by the standard of reasonable needs confirms its propriety.

Presumably, the understanding of those who executed the treaties was that the tribes were reserving, and the United States was securing against encroachment, such a share of the fishery as would satisfy the present and future needs of the group. That is the only way to give meaning to the promise made to the Indians that they would continue to enjoy their vital fishing rights. Looking to needs is consistent with the criterion used in water rights cases. Thus, in *Arizona* v. *California*, 373 U.S. 546,

600-601 (1963), the Court in effect implied a provision in the instruments creating the reservations which stipulated that the Indians should have "the right of taking water from the river in common with the citizens of the Territory." The measure of the right was not population, but potentially irrigable acres as a fairer index of needs. So here. Needs, not population, should determine the tribal share of the fishery.

This is not to say that, in the case of fishing rights, the size of the Indian treaty population is wholly irrelevant. The needs of the group are, to some degree, related to the number of members, and it is of course unnecessary to allocate a portion of the fishery in excess of those needs. But we must remember that the right reserved was for the benefit of entire tribes, all the members of which were dependent on fish for food and much else. To the extent that population figures are relevant, one properly looks to the total membership, not the number of active fishermen. What is more, the "right of taking fish" guaranteed by the treaties was not for dietary subsistence only: it was meant to secure also the continuance of the very substantial Indian commerce in fish, by which means the tribes obtained the other necessities of life.

3. Tribal needs could not be determined with precision when the district court made its basic ruling in 1974. It was obviously insufficient to look to the conditions then prevailing. That was a low point for the Indians, whose fishing, in large part,

had been preempted by almost a century of discrimination, official and unofficial. We need only remember the appropriation of traditional fishing places by huge fish wheels, licensed by the State, which the Court confronted in the *Winans* case, and the effective exclusion of treaty steelhead fishing accomplished by the regulations annulled in *Puyallup II*. Under compulsion of such acts in derogation of their treaty rights, substantial numbers of Indian fishermen had abandoned their trade, and the traditional role of the tribes in commercial fishing had been very substantially reduced. Plainly, that artificial situation no more measured the reasonable needs of the treaty tribes than did the actual use of water on the reservations of the lower Colorado determine the irrigation needs of those tribes in *Arizona* v. *California*.

And so, the district court here properly sought guidance beyond the present, attempting to restore the Indians to their true entitlement by examining the past and probing the future. Of course, some degree of inexactness must result. But, except in one instance,[33] the experience of the past five years has shown that the present allocation of roughly 50% of the fishery to the treaty fishermen does not exceed the reasonable needs of the several tribes. That fact vindicates the district court's apportionment

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[33] The only exception is the Fraser River salmon run, in which some tribes have a protected treaty right. Although the district court recognized that those treaty fishermen should have the opportunity to catch 50% of the American share, they have not, to date, taken that full share. See n.38, *infra*.

against any claim that it is over-generous to the Indians.

Arguably, a *larger* share for the tribes would be appropriate. Perhaps their agreement to share the fisheries limits the treaty Indians to 50%, even if a greater need were demonstrated. But they cannot be required to take less on a record that fully justifies an apportionment of at least half the fishery to the tribes.

D. Particular Challenges To The Court's Apportionment

The details of the plan devised to implement the apportionment are not properly matters for this Court. The appropriate mechanisms are necessarily left to the trial court, closer to the "many variables" involved. *Winans, supra,* 198 U.S. at 384; *Puyallup II, supra,* 414 U.S. at 48-49; *Puyallup III, supra,* 433 U.S. at 177. The Court will have fully discharged its duty—assuming it feels compelled to review the merits at all—once it satisfies itself that the allocation made is not manifestly inconsistent with the governing principles. Nevertheless, we briefly answer some of the objections interposed.

1. The resource allocated

Petitioners complain that the district court's formula allocates *more* than half the fishery to treaty fishermen, repeatedly referring to the treaty share as "50% plus." *E.g.*, Wash. Br. 6-7. The impression may be left that the non-Indian citizens of Washington catch less than half the fish. That is far from the fact. According to the State's own figures (A. 635-641), non-Indian fishermen in 1977 caught more

than 82% of the State salmon harvest. The disparity is explained by the fact that the court's order allocates to treaty fishermen a share only of those runs which are destined for the tribal fishing grounds protected by the treaties—probably less than half of the total. This is as it should be. But it dilutes the claim that judicial implementation of the Indian treaties has "precipitated an economic upheaval for commercial fishermen in the State of Washington" (Wash. Br. 7).

What is more, as varied by the court of appeals (see A. 52-53, 59), the rule now is that fish destined for the tribal fishing grounds are not counted in the apportionment if intercepted by foreigners or by citizens of other States and landed outside Washington (A. 458). Although this does not directly advantage non-Indian Washington fishermen, it reduces, by a substantial margin, the size of the run on the basis of which the treaty share is computed. To the extent that such foreign and out-of-state fishing is within the control of the United States (albeit not the State), the tribes properly may point to this circumstance as significantly diminishing the runs that would naturally reach their traditional fishing places.

This consideration, among others, justifies the inclusion of hatchery-reared fish for allocation purposes. The contribution of federal funds to the Washington hatchery program perhaps reflects, in part, the responsibility of the United States for ocean catches which deplete the natural run. It should be stressed, however, that the hatchery issue—a question left open by this Court in *Puyallup III, supra,* 433 U.S. at

177 n.17—is not ripe for determination here. The matter is now pending in the district court on the State's motion to modify the decree (Wash. Br. 91-92)[34] and is, in any event, one of the questions to be taken up in the "Phase II" proceedings (see pages 13, *supra*). Plainly, this Court ought not intervene at this juncture.

2. *On-reservation catches*

Invoking *Puyallup III*, the State argues that on-reservation catches ought to be counted against the allocation to treaty fishermen. The short answer is that, once again, the matter is pending before the district court on the State's motion for modification. In those circumstances, this Court would normally withhold its ruling.

In any event, the applicability of the *Puyallup* decision in the context of the present case is doubtful. That was a narow holding, premised on doubts concerning the continued existence of the reservation, at least beyond 22 acres of non-riparian land (433 U.S. at 173 n.11, 174), and on fears that, in the special circumstances, the tribe might wholly preempt or destroy the fishery (*id.* at 176). It ought not be read as laying down an inexorable rule that on-reservation fishing is always governed by treaty provisions which uniformly have been construed to apply only to off-reservation activities.

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[34] The complaint that the district court has not acted on the motion is not without remedy. At all events, it is no ground for asking this Court to decide the question in the first instance.

Moreover, the focus is different here. In this case, the State initially conceded the exclusive right of the tribes to fish on their reservations (see A. 70 n.12), and the court implicitly found that tribal fishing did not imperil the fishery (See A. 70 n.12). The question is simply whether reservation catches ought to be taken into account. Nor is the size of such catches now uncontrolled. The tribes are required to announce their estimates in advance and seek the State's agreement (A. 224-225, 458). Ultimately, the court reserves power to make adjustments (A. 228). But, in practice, negotiations have almost always produced agreement, involving, in some cases, a significant reduction of the on-reservation exemption. See, *e.g.*, Fisheries Advisory Board Reports Nos. 78-73 and 78-79, Sept. 11 and 25, 1978. There is, accordingly, no reason to apprehend abuse of the exception.

3. *Subsistence and ceremonial fishing*

Complaint is also made that fishing for subsistence and ceremonial purposes is not counted against the allocation of the treaty tribes. But that provision of Final Decision No. 1 (A. 88) was not challenged on appeal (see A. 54), and such a challenge is therefore foreclosed here. See *Anderson* v. *United States*, 417 U.S. 211, 217 n.5 (1974); *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).

At all events, the point is ill taken. The quantities involved are de minimis. Nor is there any potential for abuse. Advance notification of expected quantities must be given to the State and the court, now

every week.[35] And, of course, the court's continuing jurisdiction is available in the event the estimates are unreasonable or are exceeded. What is more, there is a like unofficial "take-home" catch by non-treaty fishermen, aggregating perhaps as much as 5% of the particular run. Transcript of Hearing, April 6, 1978, at 183. Although known to the court, this "take-home" fishery is not taxed against the non-treaty allocation.[36] Thus, both groups satisfy their personal consumption needs outside the apportionment, the only difference being that the Indians alone must openly declare the size of their catch.

4. *The Fraser River salmon runs*

There is no issue properly before this Court in respect of the allocation of the salmon runs destined for the Fraser River as they traverse the waters of the Strait of Juan de Fuca and upper Puget Sound under the jurisdiction of the International Pacific Salmon Fisheries Commission. Notwithstanding the State's allegations (Wash. Br. 65), the fact is that the district court's 1975 orders in the so-called International Fishery Case have long since expired and have not been renewed. Nor is there any prospect that like orders will be entered in the future. As we detail in the Statement (*supra*, pages 39-43), this fishery is now directly governed by federal regula-

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[35] Memorandum Order and Preliminary Injunction Re Salmon Allocation for 1978 and Subsequent Seasons, August 11, 1978, at 5.

[36] *Id.* at 7. See also A. 611-612.

tions, which implicate neither the district court nor the State of Washington. In those circumstances, as the court of appeals held (78-119 Pet. App. A-29), any issue raised by the district court's orders is moot, and this Court has no occasion to render a decision on the point. Cf. *Environmental Protection Agency* v. *Brown*, 431 U.S. 99, 103-104 (1977).[37]

The International Fisheries Case aside, it is true that there is a ruling in the main case allowing the Fraser River run to be taken into account for the benefit of some of the treaty tribes (see A. 53-54, 214), and it may be suggested that this brings at least the question of compensatory adjustment before this Court. The short answer, however, is that this provision of the original decision is mooted by the Interior Department's regulations allowing treaty fishermen actually to catch a share in IPSFC waters. There is thus no occasion to make an adjustment.[38] Any argument that the Convention with Canada qualifies the Indian treaties in suit must therefore be addressed in the separate proceedings challenging the new federal regulations.

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[37] To be sure, the present scheme of regulation may be open to challenge in separate proceedings. Indeed, as our Statement recites (*supra*, pages 41-43), two such actions are now pending. But those cases were not sought to be brought here, and the Court cannot review the questions there presented on the present writs of certiorari.

[38] As we have previously noted, the eligible treaty tribes do not at present catch their full 50% share of the American portion of this fishery. But the district court has not, on that account, adjusted the entitlement of these tribes on other runs.

III

ENFORCEMENT

Much ink has been spilled attacking the orders by which the district court has sought to implement the basic apportionment decision. Trimmed to the essentials, however, there are three challenges: it is variously said that the court overstepped its jurisdiction in (1) mandating state officials to take action inconsistent with state law, (2) assuming direct supervision of the fishery, and (3) enjoining individual fishermen to obey the decision. We consider these points *seriatim*.

A. The Propriety Of Mandating State Officials

We are heartened by the State's emphatic acknowledgement that its officials will implement the district court's orders if its decision is upheld, and by the expression of confidence that the state courts "will accede to this Court's interpretation of the treaties in the future." Wash. Br. 95-96. We regretfully note, however, that the other petitioners "strongly disagree," correctly adding that neither the legislature nor the courts of Washington are bound by the State Attorney General's concession. PSGA Br. 54-55 n.44. Accordingly, we must address the question.

The answer can be short. Indeed, we need hardly go beyond the Supremacy Clause, which, in relevant part, provides that "all Treaties made * * * under the Authority of the United States, shall be the

supreme Law of the Land," binding on "the Judges in every State," as well as "all executive * * * Officers * * * of the several States," "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cls. 2, 3. Thus, state law obstacles are simply irrelevant when enforcing the command of a federal treaty, as authoritatively construed by the courts of the United States. *Cooper* v. *Aaron*, 358 U.S. 1 (1958).

Of course, there are limits to the rule. One cannot properly require the State Superintendent of Schools to allocate a fishery. But when the official against whom the injunction is directed has clear responsibility for the subject matter, it is settled that he may not avoid the obligation to enforce federal law merely because a state statute purports to prohibit it. See, *e.g.*, *Griffin* v. *School Board*, 377 U.S. 218 (1964). Nor is the result changed because the state law is construed to deny the officer's "authority" to perform the act required by the "supreme law of the land." If state officials properly can be mandated to operate desegregated schools notwithstanding the most fundamental prohibition of their statutes, they can be ordered to operate an apportioned fishery. *E.g.*, *James* v. *Almond*, 170 F. Supp. 331 (E.D. Va.), appeal dismissed, 359 U.S. 1006 (1959); *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649 (E.D. La. 1961), aff'd, 368 U.S. 515 (1962). See, also, *Graham* v. *Folsom*, 200 U.S. 248 (1906); *County Commissioners* v. *Moulton*, 112 U.S. 217 (1884).

At all events, the present case is governed by *Puyallup II and III*. If the Washington Department of Game could be "mandated" (433 U.S. at 177) to make a separate allocation of steelhead to Indian fishermen under authority of the treaties, notwithstanding identical State law obstacles (77-983 Pet. App. D-5, and see 86 Wash.2d 664, 680, 690, 548 P.2d 1058, 1070, 1075), it is not apparent why the same treaties cannot require the Department of Fisheries to make a like allocation of the salmon fishery.

B. The Propriety Of Judicial Supervision

We address next the orders of August 31, 1977 (78-119 Pet. App. A-35 to A-77) by which the district court assumed direct supervision of the treaty fishery. As we have detailed in the Statement (*supra*, pages 24-25), this remedial device was resorted to, more than three years after the basic apportionment decision of 1974, only when the Washington Department of Fisheries, caught in a cross-fire of injunctions, ultimately declined to implement that decision. Nevertheless, it is said the district judge exceeded his powers in appointing himself "fishmaster."

It is of course regrettable that the federal court should have been driven to assume such unfamiliar responsibilities. But, as the court of appeals found (78-119 Pet. App. A-9), "[t]he current crisis is the result of a breakdown in state law enforcement in 1977." The district court exhausted every effort to secure the help of State agencies in implementing the treaty rights of the Indians. Indeed, for a time, the Washington Department of Fisheries lent its co-

operation. But its regulations were largely ignored by non-Indian fishermen, while the State's enforcement officers looked the other way. And, at length, the Fisheries Department withdrew from the field, after warning shots from the state courts which directed or invited disobedience of the federal court's orders. In those unique circumstances, the trial judge was fully justified in acting as he did.

The court's plan, so much criticized, merely reflects the complexities of the problem and the hostile context in which it arises. A simple directive does not accomplish the effective apportionment of the fishery. Of necessity, detailed regulation is called for. All the more so, when local agencies default and a large segment of the fishing community pledge themselves to defeating the command of the underlying treaties. The district court has done no more than employ the resources of equity to remedy a violation of federal law. Its orders go no further than was necessary effectively to right the wrong. See *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971); *Milliken* v. *Bradley*, 433 U.S. 267, 280-281, 290 (1977). See, also, *Hills* v. *Gautreaux*, 425 U.S. 284 (1976); *Hutto* v. *Finney*, No. 76-1660 (June 23, 1978).

Of course, one hopes the present situation is merely temporary. If this Court affirms the apportionment decision, the state agencies, we are assured, will issue appropriate regulations and resume their supervisory duties. So, also, the fishing associations before the Court have undertaken to obey the ruling

in good faith. In those conditions, the district court would be free to return the administration of the fishery to the appropriate state officers. But the court cannot be faulted for filling the void until normal enforcement is restored.

C. The Propriety Of Enjoining Individual Fishermen

It is vigorously maintained that the district court acted beyond its jurisdiction when it enjoined individual fishermen from violating its apportionment decision. Problems of contempt aside (and no such question is before the Court in this case), this is something of a false issue. Indeed, if, as the State represents, affirmance of the district court's apportionment decision will require the Washington Department of Fisheries to promulgate and administer implementing regulations which the state courts will sustain, non-Indian fishermen will be ruled by them. The only difference will be that state, rather than federal, authority will enforce compliance. Direct injunctions emanating from the federal court may no longer be necessary.

At all events, we submit that the challenged orders were well within the district court's jurisdiction. There is ample precedent for restraining (and punishing in the event of disobedience) a non-party who actively interferes with the implementation of a court order establishing public rights. *E.g.*, *Kasper* v. *Brittain*, 245 F.2d 92 (6th Cir.), cert. denied, 355 U.S. 834 (1957); *Bullock* v. *United States*, 265 F.2d 683 (6th Cir. 1959), cert. denied, 360 U.S. 909 (1959); *United States* v. *Hall*, 472 F.2d 261

(5th Cir. 1972).[39] Whatever the limits of the rule, it certainly encompasses the situation in which the "outsider" is seeking to defeat compliance by a party. That is this case: the Department of Fisheries defaulted *at the instance of the fishermen* who now complain of the injunction running against them.

In this case, moreover, there was a more traditional basis for the injunctions directed at individuals. As we have shown (*supra*, pages 48-51), the addressees of the orders were already bound, as citizens of the State, by the court's apportionment decision. They could not properly relitigate the issue which the State, as their representative, had contested and lost. And, it follows, they could, if necessary, be particularly enjoined to obey the judgment. See *Golden State Bottling Co.* v. *NLRB*, 414 U.S. 168 (1973), and authorities cited at 179-180. What is more, the present proceeding was one in rem—to apportion a fishery—and it is settled law that the court possessed of the res may enjoin those who would interfere with that custody. See *Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 641 (1977).

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[39] For other cases upholding the courts' power to enjoin or to punish the contemptuous conduct of non-parties who have actual notice of an injunction yet seek to frustrate the courts' judgments, see *Russell* v. *United States*, 86 F.2d 389 (8th Cir. 1936); *Minerich* v. *United States*, 29 F.2d 565 (6th Cir.), cert. denied, 279 U.S. 843 (1928); *Garrigan* v. *United States*, 163 F. 16 (7th Cir.), cert. denied, 214 U.S. 514 (1908); *Coffey* v. *Braddy*, 372 F.Supp. 116 (M.D. Fla. 1971); *In re Curtis' Petition*, 240 F.Supp. 475 (E.D. Mo. 1965), aff'd, 362 F.2d 999 (8th Cir. 1966), cert. denied, 386 U.S. 914 (1967).

It is perhaps unfortunate that the absence of state enforcement and the resistance of many required the issuance of particularized orders to non-Indian fishermen. But, in the circumstances, we submit that course was obviously appropriate.

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals in the Washington Fishery case and the International Fishery case should be affirmed. The judgments of the Washington Supreme Court in *Fishing Vessel II* and *Gillnetters* should be reversed, and the cases remanded with instructions to dismiss the actions.

Respectfully submitted.

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